90-7675

No. _____

In the

Supreme Court of the United States

October Term 1990

In the Matter of the Welfare of R. A. V.

On Appeal from the
Supreme Court of Minnesota

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MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF
THE MINNESOTA CIVIL LIBERTIES UNION
RESPECTING PETITION FOR CERTIORARI

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IN THE MATTER OF THE WELFARE OF R. A. V.

ON APPEAL FROM THE SUPREME COURT OF
MINNESOTA

MOTION OF THE
MINNESOTA CIVIL LIBERTIES UNION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
RESPECTING PETITION FOR CERTIORARI

Movant is a non-profit and non-partisan organization dedicated to the protection and preservation of civil liberties. It concentrates particularly on civil liberties issues in Minnesota. The written consent of the Petitioner, R. A. V., has been obtained and filed with the clerk of this Court. The consent of the Respondent has been requested and

refused.

Movant seeks to submit a brief amicus curiae because it shares with Petitioner a vital interest in the outcome of this proceeding. The St. Paul city ordinance at issue and the decision of the Minnesota Supreme Court interpreting it threaten to have severe repercussions on freedom of expression in Minnesota.

Movant requests this Court to grant leave to file its accompanying brief amicus curiae to present its views to this Court urging modification or reversal of the opinion of the court below.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Interest of Amicus Curiae	1
Introduction	2
Argument	6
Conclusion	19
Appendix: Letter of Petitioner granting leave to file brief amicus curiae	A-1

TABLE OF AUTHORITIES

CASES

Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 12

Brandenburg v. Ohio, 395 U.S. 444 (1969) 7, 10, 16

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 6

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 11

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 7, 10, 16

Gooding v. Wilson, 405 U.S. 518 (1972) 11

Houston v. Hill, 482 U.S. 451 (1987) 10, 12, 13

In the Matter of the Welfare of R. A. V., 464 N.W.2d 507 (Minn. 1991) 6, [illegible], 15, 16

Miller v. California, 413 U.S. 15 (1973) 17

NAACP v. Button, 371 U.S. 415 (1973) 11

Papachristou v. Jacksonville, 405 U.S. 156 (1972) 18

TABLE OF AUTHORITIES,
continued

Secretary of State of Maryland
v. Joseph H. Munson Co.,
467 U.S. 947 (1984) 12, 13

Smith v. Goguen,
415 U.S. 566 (1974) 18

Thornhill v. Alabama,
310 U.S. 88 (1940) 10

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In the Matter of the Welfare of R. A. V.

On appeal from the
Supreme Court of Minnesota

Brief Amicus Curiae of the
Minnesota Civil Liberties Union
Respecting Petition for Certiorari

INTEREST OF THE AMICUS CURIAE

The Minnesota Civil Liberties Union (MCLU) is a private, non-profit, non-partisan, membership-supported organization having more than 6,000 members in the state of Minnesota. The MCLU is a state-wide affiliate of the American Civil Liberties Union. Its purpose is the protection of the rights and liberties preserved by the Minnesota and

United States constitutions. Among these liberties are the freedom of speech and of the press, and the MCLU has been active in defense of these freedoms against laws limiting the flow of information that the First Amendment was enacted to secure.

INTRODUCTION

The effort of minorities and other protected groups to become full and equal participants in American society continues to be a major catalyst of social change and controversy. The ferment this produces requires constant response by units of government at every level.

In the past few years, a major facet of this response has involved the attempt to address so-called hate crimes. Throughout the country, laws and regulations have been enacted that seek to

deter and punish such behavior. This in turn has led to intense debate about the proper limits of these regulations (including the now ubiquitous controversies over "political correctness," and methods of enforcing it). The enactment by the St. Paul City Council of the ordinance at issue in this proceeding is a reflection of this process, and the ordinance is characteristic of many similar initiatives.

Though the motivation behind the ordinance may have been laudable, it incorporated virtually no sensitivity to its possible effect on freedom of expression. Petitioner R. A. V. therefore asked that it be invalidated as facially overbroad. The trial court agreed with Petitioner, but the Minnesota Supreme Court did not. As a result, this case

presents a clear failure by the Minnesota Court properly to apply decisions of this Court designed to protect free expression.

Compounding this failure is the fact that the Minnesota Court's decision was quite plainly influenced by its own views about the content of the speech at issue. The purportedly narrowing construction of the St. Paul ordinance that the Court adopted in reality does nothing to protect free expression. It does, however, reward and encourage the disregard for the First Amendment exhibited by the St. Paul City Council when it enacted the ordinance. Thus, if allowed to stand, the decision will inevitably lead to more improper enactments, with the consequent hazard they pose to free expression.

It is the position of Amicus that

behavior of the type allegedly engaged in by Petitioner is repugnant, degrading, and appropriately subject to zealous prosecution. Amicus and its affiliated organizations invest enormous effort in seeking to eradicate such behavior. But the particular ordinance employed to charge R. A. V. is hopelessly flawed, and threatens much constitutionally protected activity. It is therefore important to emphasize that it is only the ordinance that is at issue in this proceeding, not the alleged behavior of Petitioner. As this Court has held many times, the end rarely justifies the means when it comes to rights sheltered by the Constitution.

Especially since this case presents issues of widespread currency and importance, Amicus urges the Court to accept jurisdiction.

The Petition herein provides a sufficient factual and procedural background. To avoid redundancy, Amicus will therefore proceed directly to the discussion of the legal issues.

ARGUMENT

The Minnesota Supreme Court rejected Petitioner's request to invalidate the St. Paul ordinance as facially overbroad on the grounds that invalidation would be excessively "strong medicine." Matter of Welfare of R. A. V., 464 N.W.2d 507, 509 (Minn. 1991), citing Broadrick v. Oklahoma, 413 U.S. 601 (1973). Instead, the Court concluded that the ordinance could be "narrowly interpreted to reach only unprotected conduct." Id. With this construction, the Court preserved the ordinance. The Court found two forms of conduct to be unprotected yet within

the reach of the ordinance, (1) "expressive conduct that amounts to 'fighting words,'" citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and (2) "conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action'" citing Brandenburg v. Ohio, 395 U.S. 444 (1969), 464 N.W.2d at 509.

This Court has held repeatedly that where an enactment is substantially overbroad, and where its primary effect is to restrict expression, the appropriate remedy is invalidation. The St. Paul ordinance meets both criteria. It is in fact an understatement to say that as drafted, the ordinance is substantially overbroad. Furthermore, virtually all forms of behavior penalized by the ordinance are expressive behavior. It is

not acts of trespass, disorderly conduct, or damage to property that are addressed, but only pure speech, whether by means of a "symbol, object, appellation," or in the form of words ("graffiti" and "characterization"). And since the gravamen of the offense created is that the expression might arouse "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender," it is obviously the content of the expression that is targeted.

Thus framed, the reach of the ordinance is truly extraordinary. The ordinance potentially applies if anyone is angered, alarmed, or resentful about any expression of the types enumerated in the ordinance, involving any of the protected categories it describes. An immeasurable range of discussions

involving race, gender, religion, and other specified topics is thus covered, especially since debates about these very topics often do provoke "anger, alarm, or resentment in others."

Since the ordinance as drafted contains no criteria by which to limit such broad application, its prohibitions at minimum extend to virtually all symbolic speech involving race, color, creed, religion, or gender: in sum, to many of the most significant subjects of controversy in our society. By also referring to graffiti as well as to any "characterization," the ordinance further sweeps within its reach much written and oral expression and arguably any drawing, cartoon, or picture.

In contrast, the potentially valid applications of the ordinance are all but

nonexistent. Although the unprotected forms of expression described in Chaplinsky and Brandenburg are well known in First Amendment theory, it would appear that only a tiny number of decisions have been reported that have actually dealt concretely with such behavior.

Because of this disparity between valid and improper applications, it is obvious that the St. Paul ordinance is grossly out of balance. When such unbalanced enactments have been brought before this Court, especially when they targeted expression, they have almost invariably been invalidated pursuant to the overbreadth doctrine. Thornhill v. Alabama, 310 U.S. 88 (1940); Houston v. Hill, 482 U.S. 451 (1987). That doctrine, which is intended to avert the "danger of tolerating in the area of

First Amendment freedoms the existence of a penal statute susceptible of sweeping and improper application," NAACP v. Button, 371 U.S. 415, 433 (1973), was given little more than lip service in the decision of the Minnesota Supreme Court, even though the description of the statute in Button fits the St. Paul ordinance quite precisely.

It is plainly true that this Court has established a preference for the use of a limiting construction rather than facial invalidation. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985). It is also true that the interpretation given an ordinance or a statute by a state's highest court will not be disturbed by this Court. Gooding v. Wilson, 405 U.S. 518 (1972). At the same time, however, this Court has continued to

employ facial invalidation when confronted with an enactment that flouts constitutional boundaries, that provides little foundation for a saving construction, and that inhibits wide areas of potentially valuable expression.

For example, in cases such as Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987), Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984), and Houston v. Hill, supra, this Court invalidated laws in which it discovered fundamental and pervasive defects. The Court concluded that such regulations "simply leave no room for a narrowing construction," Board of Airport Commissioners, 482 U.S. at 475, and that they have "no core of constitutionally protected expression to which

they might be limited," Houston v. Hill, 482 U.S. at 468. Such a law "in all its applications . . . creates an unnecessary risk of chilling free speech." Secretary of State of Maryland, 467 U.S. at 968. In every one of these decisions and in others, this Court could simply have endorsed or adopted limiting constructions similar to the one embraced by the Minnesota Court, thus preserving truncated versions of the regulations at issue. Such an approach, however, would effectively destroy the substantive applications of the overbreadth doctrine and would have the consequence of unleashing those forces that are always ready to restrict free expression.

The decision of the Minnesota Supreme Court threatens to produce exactly such results in Minnesota.

1. As construed by the Court below, the St. Paul ordinance may no longer be overbroad, but it is now incurably vague. Particularly because of the purposes of the ordinance, this vagueness will inevitably deter expression.

2. The conclusion reached by the Minnesota Court explicitly rewards overzealous and politically motivated prosecutions by a city administration that may well seek to generate political capital by continuing to use the ordinance against viewpoints that conflict with the version of political correctness adhered to by the administration.

3. The Minnesota Court's warm and expansive endorsement of the purposes of the ordinance, and the tepid criticism of the drafters' lack of First Amendment sensitivity ("the St. Paul ordinance

should have been more carefully drafted", 464 N.W.2d at 511), will only encourage similar excesses in other jurisdictions. The Court acknowledged the strong expressive content that some symbols can carry (see footnote 1, 464 N.W.2d 508), including burning crosses and swastikas. However, the tone of the Court's response to this recognition actually encourages such overreaching as that engaged in by the St. Paul City Council, rather than controlling it consistent with constitutional principles. It calls into serious question whether the Minnesota Court properly recognized those principles arising under the First Amendment in reaching its decision.

The pervasive vagueness of the reconstructed ordinance noted in point 1 above merits brief additional

consideration. By "limiting" the ordinance to conduct "that amounts to fighting words" or "which is directed to inciting or producing imminent lawless action" (464 N.W.2d at 510), the Court at best has exchanged overbreadth for vagueness. It seems unlikely that these forms of unprotected expression, as described in Chaplinsky and Brandenburg, were intended to constitute criteria that by themselves are sufficient to satisfy constitutional mandates. In the context of a specific statute, with the reference points provided by the statute, as in Chaplinsky or Brandenburg, such descriptions have meaning. But as a consequence of the extraordinary possible reach of the St. Paul ordinance as originally drafted (and as it will of course continue to appear in the code of

ordinances), the construction adopted by the Minnesota Court is basically equivalent to an ordinance stating only that "fighting words are illegal."

In other areas of expression this Court has held that the simple capacity of certain words to be defined with sufficient precision to avoid offending constitutional requirements, e.g., "obscene," does not mean that an ordinance simply prohibiting, for instance, "all obscene publications" would meet constitutional standards. Miller v. California, 413 U.S. 15 (1973). Yet the Minnesota Court has fallen into just such an error in its decision below.

Where people are left to guess at the meaning and application of a penal statute, a constitutional offense is committed that is every bit as fatal to the

enactment as is overbreadth. Papachristou v. Jacksonville, 405 U.S. 156 (1972). Such vagueness, because it fails to give fair notice of prohibited behavior, and because it carries especially significant potential for arbitrary enforcement, is contrary to the fundamental requirements of due process. And these considerations have been applied with particular exactitude when the regulation is aimed at free expression. Smith v. Goguen, 415 U.S. 566 (1974).

The construction adopted by the Minnesota Supreme Court still threatens real and substantial harm. Only a complete redrafting of the ordinance, with specific criteria as to what constitutes "fighting words" and "incitement" in the context of hate crimes, could correct the

flaws in the construction imposed on the ordinance by the Minnesota Court.

CONCLUSION

It is no remedy merely to exchange one constitutional infirmity for another. Yet this is what the Minnesota Supreme Court has done. Its decision represents an unfortunate precedent and a substantial incentive for similarly excessive initiatives. Amicus therefore respectfully asks that the Petition for Certiorari be granted.

Respectfully submitted,

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April 16, 1991

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RE: In the Matter of the Welfare of R.A.V.

Dear Mark:

I am in receipt of your letter dated April 15, 1991 wherein you indicate that you will be preparing an amicus brief on behalf of the Minnesota Civil Liberties Union and the American Civil Liberties Union with respect to my Petition for Certiorari with the United States Supreme Court.

As counsel for R.A.V., this is written confirmation that I consent to the filing of an amicus brief by the MCLU/ACLU. By this time, you should have received a copy of my Petition and I hope it is helpful to you as you prepare your brief.

Sincerely yours,

EDWARD J. CLEARY